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DR BERNADINE MALINI MARTIN

v.

MPH MAGAZINES SDN BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO. S3-23-63-1998]
29 MAY 2006

C ***TORT:*** *Defamation - Libellous publication in magazine - Consent to publish - Conduct of defendants - Whether publication defamatory*

CIVIL PROCEDURE: *Costs - Discretion of court - Successful party deprived of costs - Special grounds - Wrong doing or misconduct - Rules of the High Court 1980, O. 59 r. 3(2)*

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The plaintiff was a government medical officer attached to the General Hospital, Kuala Lumpur. The first defendant was the publisher of Female magazine, the second defendant ran a bridal gown shop/boutique and the third defendant ran a photo studio. In the September issue of Female magazine, the defendants' co-sponsored a bridal gown promotion-cum-advertisement which consisted of a write-up and a photograph of the plaintiff in a bridal gown, published without the consent of the plaintiff ('said advertisement'). The plaintiff alleged that the said advertisement portrayed her as a woman of loose morals and an unsuccessful doctor who had to resort to part-time modeling to supplement her income. The plaintiff brought an action against the defendants for the tort of defamation. The sole issue which arose for determination was whether the combined effect of the said advertisement was defamatory of the plaintiff.

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Held (dismissing the plaintiff's suit):

(1) The words complained of read together with the plaintiff's photograph did not convey any derogatory meaning. The words were appropriate and had nothing to do with any immoral activity or lack of virtues. The plaintiff had contorted a simple and clear-cut concept. In terms of both semantics and literature, there was nothing in the said advertisement that stated or implied that that the plaintiff in the bridal gown was a person who encouraged and/or condoned immoral activities and who was lacking in virtue. It also did not present or imply

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anywhere in the said advertisement that the plaintiff was not a successful medical practitioner and engaged in modeling to supplement her income. It was rather far-fetched for anyone to imply that the plaintiff needed to have her shot taken to supplement her income. The concept of the photograph had been blown out of all proportion. (paras 16, 17, 19 & 21)

(2) On the issue of costs, there were special grounds connected with the cause of action which concerned the unauthorized publication of the plaintiff's photograph in a magazine meant for public circulation. It was ethically and morally wrong for the first and second defendants to have published the plaintiff's photograph for their commercial promotion without her consent and it constituted an invasion of the plaintiff's privacy. Whilst the first and second defendants knew of the necessity to obtain the plaintiff's consent before publishing her photograph, they had both taken the matter of consent very lightly. The first and second defendants were not entitled to costs. (paras 40 & 51)

(3) As for the third defendant, although he was a co-sponsor of the promotion for the magazine, he was clearly not involved in the publication of the plaintiff's photograph. He had however given two copies of the plaintiff's photograph to the second defendant without the plaintiff's consent and one of those photographs were published *vide* the said advertisement although the third defendant did not know this. He had apologized to the plaintiff appropriately and thus should not be penalized with costs as there were no special circumstances to warrant the court to do so. (para 55)

[Costs to 3rd defendant; no costs awarded to 1st and 2nd defendant.]

Case(s) referred to:

Ottoway v. Jones [1955] 2 All ER 585 ***(refd)***

Petroliam Nasional Bhd (PETRONAS) & Anor v. Cheah Kam Chiew [1987] 1 MLJ 25 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 59 r. 3(2)

For the plaintiff - VK Lingam (Pradeep Kumar with him); M/s KL Rekhraj
For the 1st defendant - Mah Weng Kwai (Sabiha Jalaludin with him); M/s Mah Weng Kwai & Assoc
For the 2nd & 3rd defendants - Cheah Tien Eu; M/s Suhaimi Khor Zulkifli & Chang

Reported by Sharmini Pillai

JUDGMENT

Hishamudin Yunus J:

[1] I shall now issue my full judgment of this case. A brief judgment was delivered in open court on 18 August 2004.

[2] This action is a claim by the plaintiff against the defendants for the tort of defamation arising from a write-up in a bridal gown promotion page in the September 1995 issue of the Female magazine.

[3] At the material time the plaintiff was a Government medical officer attached to the General Hospital, Kuala Lumpur.

[4] The first defendant was the publisher of the Female magazine. The 2nd defendant ran a bridal gown shop/boutique called White & Lacy, whilst the 3rd defendant ran a photo studio by the name of T.A.G. Studio.

[5] In the September 1995 issue of Female magazine, at p. 159, there is a bridal gown promotion-cum-advertisement co-sponsored by three parties, namely:

(a) Female magazine, that is to say, the 1st defendant;

(b) White & Lacy, that is to say, the 2nd defendant; and

(c) T.A.G. Studio, that is to say, the 3rd defendant.

[6] The promotion-cum-advertisement page has a write-up with the heading:

A Special Night ...

[7] And, immediately below this heading, are the following words:

> Nothing could be more special than the night of your wedding. From the trousseau to your walk down the aisle, all eyes are turned to you, you'll want everything to be just right.

[8] Then, what follows next is a write-up which directly concerned the promotion-cum-advertisement, which is not directly the subject matter of this suit.

[9] On the right hand side of the page is a photograph of the plaintiff attired in a bridal gown.

[10] The complaint of the plaintiff is that the photograph was published without her consent, and that the words:

> A Special Night …
>
> Nothing could be more special than the night of your wedding.

when read together with her photograph on the page, portray her as a woman of loose moral and as an unsuccessful doctor who had to resort to part-time modeling to supplement her income.

[11] It is undisputed that the photograph was published without the consent of the plaintiff.

[12] From the evidence it is my finding that the write-up and the photograph were published in the Female magazine by the 1st defendant with the knowledge and approval of the 2nd defendant, but without the knowledge or approval of the 3rd defendant.

[13] In the present case, I think it suffices that I deal with only one issue: Was the combined effect of the write-up and the photograph defamatory of the plaintiff?

[14] Having given due consideration to the evidence and submissions, in my judgment, the words complained of appearing at p. 159 of the September 1995 issue of the Female magazine –

> A SPECIAL NIGHT …
>
> Nothing could be more special than the night of your wedding.

read together with the plaintiff's photograph, do not convey any derogatory meaning.

[15] The meaning of the above words must be ascertained by considering the context in which they are written.

[16] The words appear in the context of a bridal-gown promotion. It refers to a special package that is co-sponsored by a bridal boutique (White & Lacy, ran by the 2nd defendant), a photography studio (T.A.G. Studio owned by the 3rd defendant), and a magazine (Female magazine – published by the 1st defendant). To my mind, the words are appropriate and have nothing to do with any immoral activity or lack or virtues.

[17] The plaintiff, in her complaint, clearly has highlighted only a partial aspect of the write-up, that is to say,

> A Special Night … Nothing could be more special than the night of your wedding,

when in fact, it continues to explain itself succinctly in the words that follow, that is to say:

> From the trousseau to your walk down the aisle, all eyes are turned to you, you'll want everything to be just right.

that the write-up centers on a bride walking down the aisle to the marvel of others and euphoric emotions of the bride. There is no connotation of copulation, as alleged. In my view, the plaintiff has contorted a simple and clear-cut concept.

[18] In addition, in terms of both, semantics and literary, there is nothing in the write-up that states or implies that the plaintiff in the bridal gown is a person who (to quote para. 10(a) of the statement of claim) "encouraged and/or condoned immoral activities and was lacking in virtues".

[19] It also does not present or imply anywhere within the text that the (to quote para. 10(c) of the statement of claim) "plaintiff is not a successful medical practitioner and engaged in a modeling to supplement her income."

[20] In my judgment, the main idea of the author of the write-up, in particular, the words:

> A Special Night … Nothing can be more special than the night of your wedding,

has been grossly distorted and exaggerated by the plaintiff and her witnesses.

[21] With regards to the photograph, a single appearance does not constitute one to be regarded as a model. True, that the plaintiff is modeled in the layout, but this does not make her a model. And to my mind it is rather far-fetched for anyone to say that the photograph implies that the plaintiff needed to have the shot taken "to supplement her income."

[22] Modeling is a profession. With reference to the evidence of PW3, Dato' Dr. Pius Martin, the father of the plaintiff, I must rule out that it is clearly a biased and discriminative statement to say that the public has a low perception of the modeling profession.

[23] The photograph itself, of the plaintiff as a bride in her wedding gown, does not portray anywhere near a woman of a low character. In fact, she is decently dressed. She is fully attired with even a veil to cover part of her head. With reference to the plaintiff's allegation, once again, to my mind, the concept of the photograph has been overblown out of proportion.

[24] Perhaps I must add that as to the Female magazine as a whole, I feel I am impelled to comment that I find nothing vulgar or sleazy about the magazine. On perusing the pages, I find it a respectable magazine that caters to the needs and interests of women in general. I have just said that I feel I am impelled to comment. I say so because notwithstanding the fact that the nature of the magazine as a whole or the nature of the contents of other pages of the magazine is not pleaded in the statement of claim, and thus is not in issue or relevant, yet, in the course of the trial two witnesses of the plaintiff, namely, PW2 and PW3 took liberty to refer to some captions or photographs in some other pages of the magazine in question and commented that the captions or photographs were obscene or phonographic; and learned counsel for the plaintiff at para. 46 of his written submissions (encl. A/WS(1)) appears to suggest that such evidence are relevant for the purpose of determining as to whether or not the specified words at p. 159 and the plaintiff's photograph are defamatory of the plaintiff. In the light of the pleadings, such evidence should not have been adduced and such a submission should not have been made.

[25] In conclusion, the plaintiff's claim against the defendants for the tort of defamation must fail, and, accordingly, was dismissed.

On The Issue Of Costs

[26] I now come to the issue of costs.

[27] Although I have dismissed the plaintiff's claim, I did not award the 1st and 2nd defendants costs. Instead, originally, I had made an order to the effect that the 1st and 2nd defendants do pay costs to the plaintiff in the following proportion: 80% to be borne by the 1st defendant, and 20% by the 2nd defendant.

[28] Even as regards the 3rd defendant, although I awarded him costs, I did not, originally, award him full costs: I had ordered that he be entitled to only 50% of his costs.

[29] I am, of course, aware that the general rule is that the successful party is entitled to costs unless he is guilty of misconduct, negligence or omission, or unless there is some other good cause for not allowing costs.

[30] However, in the present case, I found the 1st and 2nd defendants, and to a lesser extent (indeed, only to a minimal degree), the 3rd defendant, guilty of some wrongdoing or misconduct in relation to the plaintiff and the present suit.

[31] But having made the above order, I then, upon reflection, felt that although I might probably be fair in my decision on the issue of costs in respect of the 1st and 2nd defendants (this is what I originally thought), I could have been unduly harsh on the 3rd defendant when I did not award him 100% costs.

[32] So, before the order was perfected, I decided to propose to the parties to review my decision in respect of costs, but only pertaining to the 3rd defendant.

[33] Accordingly, by letter (encl. 60) and through the registrar, I directed parties to appear before me on 14 September 2004. The courts letter informed the parties of my proposal to review my order pertaining to costs in respect of the 3rd defendant. The solicitors for the 1st and 2nd defendant responded to the court's letter by writing to the court (their letters being encls. 61 and 62, respectively) seeking also a review of the court's order pertaining to the issue of costs in respect of the 1st and 2nd defendants.

[34] The parties appeared before me on 14 September 2004. I informed all parties that I would like them to submit on the issue as to whether I ought to exercise my power of review on the issue of costs pertaining to all three defendants. I fixed 1st November 2004 as the date of the hearing of the review proposal/ applications.

[35] At the hearing on 1 November 2004, Encik Pradeep Kumar, counsel for the plaintiff, raised a preliminary objection, the objection being that the court was now *functus officio* and no longer had the power to review its decision of 18 August 2004. I called for written submissions on this preliminary objection, and fixed 18 January 2005 as the date of the decision on the preliminary objection.

[36] On 18 January 2005 I ruled on the preliminary objection. I ruled in favour of the defendants. I ruled that since the order of the court of 18 August was yet to be perfected I had the inherent power to review the order of 18 August. That is trite law.

[37] Accordingly, I invited written submissions on the main issue of the proposed review on the issue of costs, and I fixed 11 May 2005 as the date of decision.

[38] On 11 May 2005 I gave my decision on the proposal/ application for review. In exercise of my power of review, I varied my earlier decision, but the decision was, nonetheless, still in favour of the defendants.

[39] The new (varied) order is now as follows. In respect of the 1st and 2nd defendants, I still maintain that they are not entitled to costs. However, I set aside my previous order that they should jointly bear the plaintiff's costs on an 80% and 20% basis. I felt that my original order was too harsh on the 1st and 2nd defendants.

[40] As for the 3rd defendant, the new (varied) order is that he is entitled to his full costs, instead of the previous entitlement of 50% only. Considering that he was not directly responsible for the publication, I was of the view that the general principle as to costs (that costs follow the event) should apply in respect of the 3rd defendant, and there is no strong or compelling reason to depart from that general principle.

[41] I shall now proceed to explain as to why I am of the view that the 1st and 2nd defendant are not entitled to costs.

[42] I shall begin by touching briefly on the background. In early 1995, both the plaintiff and Dr. Ng Kwee Boon (PW2) decided to get married. Preparations for the wedding were made by the plaintiff and PW2. Prior to the marriage, the plaintiff went to White & Lacy in March 1995, to have the wedding and evening gowns tailored. The plaintiff herself informed the 2nd defendant of her choice of design for the said gowns. The 2nd defendant subsequently designed the wedding and evening gowns to the plaintiff's satisfaction.

[43] Subsequently, the 2nd defendant introduced the plaintiff to the 3rd defendant as the photographer to take the wedding photographs of the plaintiff and PW2. The wedding photographs were taken in early April 1995. The negatives and the wedding photographs of the plaintiff and PW2 were returned by the 3rd defendant to PW2. However, the 3rd defendant kept the rejected prints. The 3rd defendant gave 2 copies of the rejected prints to the 2nd defendant for her portfolio to be shown to her prospective clients.

[44] Three months prior to the publication of the September issue of the Female magazine, the 1st defendant decided to have a bridal promotion in the September issue of the said magazine. Three officers of the 1st defendant, namely:

(1) Ms Susan Abraham;

(2) Ms Kalaivani (DW3), the Senior Promotion Executive; and

(3) Ms Karen Yoong, Promotion Executive,

were involved in the said bridal promotion.

[45] In July 1995, DW3 was introduced by a former Assistant Sales Manager of the 1st defendant, one Ms Jennifer Moy, to the 2nd defendant for sponsorship of the bridal promotion.

[46] It is not disputed that the idea to publish the plaintiff's photograph for the purpose of the promotion in the Female magazine originated from the 1st defendant. And it all began when DW3 went to the 2nd defendant's office to obtain a suitable photograph for the purpose of the publication of the bridal

promotion. DW3 saw, chose and took the plaintiff's photograph which was then in the possession of the 2nd defendant as the ideal photograph to be published in the promotion page of the magazine. The 2nd defendant on her part undertook to obtain, on behalf of the 1st defendant, the consent of the plaintiff. When the dateline for the publication of the September issue was drawing near, the 2nd defendant still had not reverted to the 1st defendant regarding the consent. However, DW3 was told by Ms Karen Young that the 2nd defendant had told her to go ahead with the publication of the plaintiff's photograph and that she would get the plaintiff's consent. Relying on what Ms Karen had told DW3, the 1st defendant proceeded to publish the promotion and the photograph. However, as it unfortunately turned out, the 2nd defendant never obtained the consent.

[47] Order 59 r. 3(2) of the Rules of the High Court 1980 states:

> (2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

[48] In *Ottoway v. Jones* [1955] 2 All ER 585 Lord Parker ruled (at p. 588):

> One starts with this, that as a general principle, costs follow the event, and the successful party is entitled to be paid his costs unless there are special grounds to order otherwise, and those grounds, it is well settled, must be grounds connected with the cause of action.

[49] The above principle was cited with approval by the Supreme Court in *Petroliam Nasional Bhd. (PETRONAS) & Anor. v. Cheah Kam Chiew* [1987] 1 MLJ 25.

[50] In my judgment, in the present case, on the issue of costs, there are special grounds connected with the cause of action. The cause of action concerned the unauthorized publication of the plaintiff's photograph in a magazine meant for public circulation. To my mind, it was unethical and morally wrong for the 1st and 2nd defendants to have published the plaintiff's photograph for the purpose of their commercial promotion without her consent. It was an unwarranted invasion of the plaintiff's privacy. It is unfortunate for the plaintiff, that the law of this country, as it

stands presently, does not make an invasion of privacy an actionable wrongdoing (it is actionable under the law of some other jurisdictions, for example, in the United States).

[51] I note with dismay that while both the 1st and the 2nd defendants knew of the necessity to obtain the plaintiff's consent before publishing her photograph, yet they had taken the matter on consent very lightly. And at the trial, as between the 1st and 2nd defendants, each party took the easy course of action by blaming one another for the failure to obtain the consent.

[52] What should have been the appropriate conduct of the 1st defendant *vis-à-vis* the plaintiff is that the 1st defendant ought to have approached the plaintiff directly in order to obtain the consent of the plaintiff. Yet, foolishly, it chose to rely on the 2nd defendant to obtain the consent; and, more foolishly, it proceeded to publish the photograph without first having obtained confirmation from the plaintiff herself as to whether or not she had consented to the publication.

[53] As to the 2nd defendant, she was the person who gave the plaintiff's photograph to the 1st defendant without the plaintiff's consent. She had an interest in doing so as she was a co-sponsor of the bridal promotion. Although entrusted by the 1st defendant to obtain the plaintiff's consent, she took no serious effort to obtain the same; although fully aware that the publication of the photograph by the 1st defendant was imminent.

[54] In the present case, I do take note of the fact that while the 2nd defendant had, through her solicitor's letter, apologized to the plaintiff and offered to publish a joint apology of all three defendants in the then forth coming issue of the Female, the 1st defendant, through its solicitors, had refused to do so. This proposed joint published apology, however, did not materialize.

[55] As for the 3rd defendant, although a co-sponsor of the promotion at p. 159 of the magazine, he was clearly not involved in the publication of the plaintiff's photograph. However, without the prior consent of the plaintiff, he had given two copies of the plaintiff's photographs (which he called "rejected prints") to the 2nd defendant for the purpose of her album (which she called 'portfolio') to be shown to intending customers of the 2nd defendant. And, as it turned out, it is one of these photographs that was given to the 1st defendant and subsequently published at p. 159 of the Female. But to be fair to the 3rd defendant, he

had no idea that both the 1st and 2nd defendants were going to use that photograph for the purpose of the bridal promotion. Like the 2nd defendant, he too, through his solicitors, had apologized to the plaintiff and offered to have the apology published in the Female (but this also did not materialize). I do not think that he ought to be penalized at all with costs. There are no special circumstances that warrant the court to do so.

[Plaintiff's suit dismissed. Costs to the 3rd defendant. No costs awarded to the 1st and 2nd defendants]